

INDIAN REPRESENTATION ON  
SCHOOL BOARDS

Acknowledgements

Terms of Reference

Procedure

to assist the author in his work

Limitations of the Study

to evaluate information on the basis of the

Meetings and Discussions in the

Course of this Study

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Conclusion

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Recommendations

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Appendix

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I. BACKGROUND

ACKNOWLEDGEMENTS

The question of Indian representation on school boards was initially dealt with by the present Provincial Government, during the 1976 session of the Legislative Assembly when Bill No. 218, An Act to Amend The School Act was introduced. The Bill would have allowed for the right for Indian representation on school boards, but it did not pass. I wish to thank the Indian representatives whom I interviewed, the staff of the Native Secretariat of the Province of Alberta for their assistance, members of the Federal Department of Indian and Northern Affairs who responded to my inquiries, representatives of School Boards who provided me with feedback. In particular I wish to acknowledge the valuable efforts of Darryl Nicolas of the Indian Association of Alberta in the facilitation of contacts with that organization's Education Secretariat. That legislation of this type would be studied and pursued.

During the 1979 session, Bill Forty (Amendment No. 20, An Act to Amend The School Act (No. 27) which would have allowed for Indian representation on school boards. Although the Bill was not enacted, the issue has been the subject of discussions between the Department and the Minister, and the Minister with the Indian Secretariat of Council. On June 17, 1981, the Minister instructed that the Education Committee not endorse the amendment recommended by the Department and that the Department was to conduct with the study.

On June 24, 1981, Dr. W. S. Hord, Associate Deputy Minister of Education, established a steering committee to study the issue of Indian representation on school boards. The committee is composed of the following officials:



Terms of Reference

1. BACKGROUND

The question of Indian representation on school boards was initially dealt with by the present Provincial Government, during the 1976 session of the legislative Assembly when Bill No. 219, An Act to Amend The School Act was introduced. The Bill would have amended Section 30 to allow for Indian representation on school boards, but the Bill was not enacted. Cabinet on December 20, 1977, approved a policy by which the Province of Alberta would make available provincial government services and programs to Treaty Indians and Indian Bands in Alberta on the same basis as to other Alberta residents and municipal jurisdictions. This extension of services and programs would have an impact on the Department of Education as well as school boards and jurisdictions. On March 15, 1978, Julian Koziak, the Minister of Education indicated to Chief Nelson Small Legs that legislation of this type would be studied and introduced.

During the 1979 session, Bill Purdy introduced Bill 214, An Act to Amend The School Act (No. 2) where Section 30 would be amended to allow for Indian representation on school boards. Although the Bill was not enacted, the issue has been the subject of discussions between the Department and the Minister, and the Minister with the Education Committee of Caucus. On June 1, 1981, the Minister indicated that the Education Committee had endorsed the study-approach recommended by the Department, and that the Department was to proceed with the study.

On June 4, 1981, Dr. J. S. Hrabi, Associate Deputy Minister of Education, established a steering committee to study the issue of Indian representation on school boards. The committee is comprised of the following officials:

Ex-officio -	Dr. J.S. Hrabi
Chairman -	Dr. W.R. Duke
Secretary -	Mr. K.A. Hussey
-	Dr. M.R. Fenske
-	Mr. W.R. Weber
-	Mr. D.G. Norton

2. PURPOSE

The general purpose of this study will be to examine and to investigate the matter of Indian representation on school boards. More specifically, the following questions and problems will be the basis for the study's objectives:

- 2.1 Should trustees from Indian reserves be elected by the people on the reserve or appointed by the Band Council?
- 2.2 If the Indian trustees are to be appointed by the Band Council, what is to be done if there is more than one Reserve and therefore more than one Band Council?
- 2.3 If the Indian trustees are directly elected, would there be a problem when the position of the trustee on any given educational matter is in conflict with the position of the Band Council?
- 2.4 How does one determine which reserves should have representation on school boards?
- 2.5 Should Indian trustees have restricted voting rights in consideration of the fact that Indian reserves are not subject to taxation.

2.6 Is the alternative of local advisory boards from Indian reserves, an acceptable compromise? Is the agreement between boards and the federal government a satisfactory vehicle for direct consultation?

2.7 Is it feasible to have Indian Trustees elected at large, in the same way as other trustees?

#### DESIGN AND SCOPE

The following will be the basic parameters for the general design and scope of the study:

3.1 Specify objectives, methodology and report progress in consultation with the steering committee.

3.2 Literature review of various proposals to date ( e.g. Bill 214) and as to how other provinces have dealt with published material on this matter

3.3 Undertake the necessary consultations with:

3.3.1 Indian Bands (Indian communities with a number of Indian leaders concerned)

3.3.2 Indian Association

3.3.3 Federal Government

3.3.4 School Authorities (approximately 13 school districts will be affected)

3.3.5 A.S.T.A., F.I.G.A., and others as required or determined by the steering committee

3.4 Make recommendations as to the manner in which this matter is to be dealt with

3.5 The writing and dissemination of a final report documenting the study's purposes, objectives, methodologies, findings, conclusions, implications for legislation and affected groups, and any such information as determined by the steering committee.

## AUTHORITY AND TIMELINE

The principal contractor will be responsible to and under the direct authority of the steering committee which will monitor and control the progress of the study through the liaison and supervision by the Secretary to the committee. The principal contractor will also be responsible for submitting periodical reports and reporting to the steering committee as to the progress of the study at intervals or times designated by the committee. The final report will be submitted to the Steering Committee no later than December 1, 1981, in order that it may be introduced in the Spring 1982 session of the Legislative Assembly.

Procedures and Methodology

1. The writer used a variety of procedures to obtain information. Initially, a brief was obtained from counsel for the A.S.T.A.

2. Background research was conducted into the legislation including not only the Indian Act, but also various provincial statutes across Canada.

Exhaustive research was conducted in a search for judicial decisions from across Canada which may have some impact upon the proposed legislation. This also included a review of case law disclosed in the A.S.T.A. brief and noting up of the same. It was noted that little if any of the pertinent legislation across Canada has been judicially considered.

3. The pertinent history of the proposed legislation since 1974 and the difficulties perceived were examined. In addition to examination of Hansard and recent discussions, the writer sought initially to ascertain what published material and opinion there might be on the issues by conducting exhaustive searches of both Canadian and other periodical Indexes.

4. Discussions were held in a number of Indian communities with a number of Indian leaders concerned with education and with the Education secretariat of the Indian Association of Alberta.

5. A number of school superintendents were contacted and their views elicited on some of the conclusions likely to be reached by the study.

6. Contact was made with persons at the Native Secretariat, Federal Department of Indian and Northern Development, and F.I.G.A.

7. A meeting was held with the School Board of the County of St. Paul, as representing one of the areas currently most affected by the impasse over capital and tuition agreements.

Limitations of the Study

There was insufficient contact made with the people necessary to make this study as complete as it ought to have been. During the month of November, many frustrations were encountered which could not have been foreseen by the writer when the contract to conduct the study was initiated.

It is the submission of this writer that the difficulties encountered during the course of this study were as much a result of a lack of sensitivity by the Department of Education to the complexity of the issues involved as it was to any cautiousness exhibited by representatives of Indian communities in recognizing the legitimacy of the study.

The writer found that Indian criticisims of the mandate of the study as being too simplistic, and of dealing with the wrong issues to be justified.

The questions as posed were not a suitable vehicle for a meaningful resolution of the various problems associated with Indian Education where the province is involved. Essentially, it is submitted that the premises upon which the questions are based are fundamentally false. Hence, within the context of provincial legislation. the questions posed are by and large incapable of resolution.

The constitutional questions involving the status of Indians remaining unresolved, and being a pivotal question at the time of this study made the conduct of the study extremely difficult. Time and again, the writer found that appointments had to be cancelled or undertakings were not met because of the intervention of the more global issues of the constitution.

Nevertheless, it became the impression of the writer that it remained the intention of the Department to press ahead with this study notwithstanding the fact that numerous key issues germane to the outcome of this study remained unresolved.

It would appear that two perhaps contradictory demands were required of this study. On the one hand, the news release from the Minister's office announced that the study was launched into the "legal feasibility" of having Treaty Indian representatives on school boards. On the other hand the question, and the bodies to be consulted indicated more pragmatic concerns. In a sense, the answer to the legal questions were presumed. Hence, when the legal answer "no jurisdiction" was arrived at, the pragmatic question appeared merely academic.

While the study repeatedly attempted to deal with the questions as posed, they were found to produce merely obfuscation and confusion.

It became apparent that the time allotted for the study was inadequate. As well, this writer submits with respect that the study would have been more effective if Indian persons per se had been more involved from the outset.

FINDINGS ARISING FROM MEETINGS AND DISCUSSIONS IN THE  
COURSE OF THIS STUDY

VISIT TO SADDLE LAKE

TUESDAY, OCTOBER 27 1981

It was indicated that the Reserve does not work with any particular one county and that there is potential for involvement of their students in three of the surrounding counties. It is the opinion of the Saddle Lake Band that capital expenditures may have been used more for the benefit of outside communities for example: if capital agreements are made to an outside county and then there is a reduction of the number of Native Indians in the schools the outside county gets the benefit of that capital expenditure and the money is not prorated back to Reserve capital expenditures.

One concern is that the Indians do want to improve their own system on the Reserve to such an extent indeed that they would hope to attract non-Indians from outside communities. Hence, there would be conflict where trustees were directly elected, between their goals and those of the Band council. The determination of which reserves should have representation on school boards was seen as a potentially unsolvable problem. Many parents want to understand how boards work and want to be able to express their concerns. The more highly developed Reserves do manage to have some input even if they do not already have representation, through the negotiation process involved in the Tuition Agreements but some way of expressing their ongoing concerns is needed as well. Currently it appears that the county is approaching the Indians directly as to representations. This is satisfactory where there is an identifiable body such as the School Board in Saddle Lake with whom they can communicate. The problem is that many Reserves do not have a School Board and so there is no vehicle for communication.

If a School Board (Reserve) member were appointed to another board (outside board) the view was expressed that it would place them in an inherent conflict position.

MEETING WITH MEL BUFFALO

BAND FOUR OFFICE

HOBBEMA

OCTOBER 28, 1981

It was indicated that the Tuition Agreements are currently being renegotiated insofar as is possible and that a great deal of the input needed by Indians can be achieved by means of the Tuition Agreement. The view was expressed that the Provincial Education Committee of the Indian Affairs Association of Alberta would offer assistance to those weaker bands in negotiations involving these Tuition Agreements. The status of the Bands to enforce these agreements is somewhat in question, since it appears that they have no capacity to sue. The Federal Minister indicates that the Bands are not a legal entity. The opinion was expressed that insofar as representation on a School Board is concerned by whatever method under discussion, there seems to be some indication that it could possibly be interpreted as merely another token gesture, particularly if the Indian representative, whether elected or appointed, could be out voted. The view was expressed that the general Indian vote should be integrated into the general population, being one of the alternatives suggested which would avoid being termed tokenism.

Appointment by a Band Council was not favoured but if that approach were to be used it was suggested that there should be one appointee for each Band and they would only become involved in School Board discussions when matters involving Indian children drawn from that particular band were to be discussed. It was submitted that there would be a problem if Indian trustees were directly elected by Indian peoples, but that if they were elected at large the democratic process would be seen to prevail.

In determining which reserves should have representation it was suggested that there is a possibility of rotating from various Bands on a Reserve during a period but this was not believed to be a particularly practical solution.

Indians should not have restricted voting rights because of the fact that Indian Reserves are not subject to taxation. The grants provided by the Federal Government under tuition and capital agreements are generally seen as standing in lieu of taxes.

Local advisory boards were not generally seen as an acceptable compromise in that they do not have any power nor were the existing agreements between boards and Federal Government seen to be a satisfactory vehicle for direct consultation.

MEETING WITH R.E. PINNEY  
REGIONAL SUPERINTENDENT OF  
NON-FEDERAL SCHOOL AGREEMENTS  
NOVEMBER 5, 1981

It was suggested that the terms of this study did not appear to be taking into account the political situation in the north. In large communities within Northland the view was expressed that it may be desirable to pull out of Northland and for reserves to form their own committees and school jurisdictions.

Insofar as the question of taxes is concerned the grant in lieu of taxes where Indians attend school should be taken into account and should not lessen any Indian representation should there be any.

In situations where there has been some involvement with voluntary formation of procedures for consultation, such efforts appear to have failed. Hence, it is essential that the legislation have some enforceability once it is implemented and that the involvement of the Indians be in fact relevant.

The option of the local band council as the whether there should be appointments or election would be desirable. A problem would be how a representative would be accountable to the Band. Basically a Band should have the power to discharge if he does not perform. The provincial Minister should have some sort of say as he does with respect to the other trustees where he can remove. The problem with that is if that is not in agreement with the Band position in such a situation the Chairman of the Board would have to appeal to the Minister.

Of the alternatives listed, it was suggested that the local advisory board is the most effective vehicle for the Indians to voice their concerns. All Tuition Agreements have provision for a subcommittee but these provisions have not been widely exercised and many Bands feel in fact that they are meaningless, however

MEETING AT SARCEE

BAND OFFICES

NOVEMBER 7, 1981

THOSE PRESENT:

Darryl Nicolas	Education Director, I.A.A.
Carol Gottfriedson	Sarcee Education Coordinator
Alex Crowchild	Sarcee Chief in Council
Dr. Joe Birdwell	Morley, Senior Advisor, Stonies
Kalvin Crowchild	Sarcee
Les Healy	Blood

There was considerable discussion of the terms of reference of this study. Weaker Bands would want to rely heavily of I.A.A. for input.

There is some disagreement as to whether or not representation on School Boards per se is desirable. I.A.A. seems to say it is not, yet certain individual Bands lobby for such representation.

Mr. Healy from the Blood Reserve indicated that insofar as the voice of the Indians is concerned it would be necessary for them to rely heavily upon the Indian Association of Alberta. Essentially his position in that regard was that the weaker bands have to get some input via the stronger body.

Mr Healy asserted that the Chiefs of Alberta have ignored the issue of education and it has been to some extent an issue that has been left up to the Indian Association of Alberta primarily because many of the Bands are so weak that it has been difficult to devote sufficient resources to dealing with the education issue.

With Native leaders being absorbed in constitutional issues especially in recent years and with the redrafting of the Indian Act it is clear that not sufficient attention has been paid to education.

Upon my inquiring as to the position of the Indian Association of Alberta with regard to dealing with the Province he indicated that their position remains much as it did with the paper Citizens Plus which was in response to Jean Chretien's policy position of 1969.

Mr. Healy read from a legal opinion that the Blood Band administration had obtained from solicitors with regard to the contents of draft Tuition Agreement (See Appendix F). He drew attention to a number of emphases in that letter namely:

- 1) That the primary responsibility for education of Indian children rests with the Government of Canada under the Indian Act.
- 2) That the Band can not be a party to Tuition Agreement within the context of the Indian Act and the School Act.

It was the view of the lawyer that the ability of the Band Council to become directly involved in a Tuition Agreement is very problematic.

Mr. Healy questioned how prepared the Provincial Government would be to recognize the Indians as a political entity, that is as a Government.

Mr. Nicolas pointed out that historically with the meetings that Indians have had with governments there have been three questions which have been at the basis of Indian concerns:

- 1) The question of quality,
- 2) The question of relevance (of curriculum etc. to Indian children) and
- 3) The question of visible representation as a solution to the above two questions.

He emphatically pointed to the record and survival rate of the children in Indian schools and pointed out that basically providing the "same" opportunities in education as other children simply means that the Indians do not survive. Thus it is apparent that the question of education must be dealt with in terms of the effectiveness of programs, the curriculum, and the teachers.

Concern was expressed that many trustees may have never seen Tuition Agreements even though their school boards are operating with them.

It was Mr. Nicolas's submission that myself and the Steering Committee should realign our terms of reference to discuss these larger questions. Bearing this in mind, his emphasis was that only when these larger issues can be appropriately addressed can the Indians be in a position to then sit down and discuss their relationship with the Provincial Government in respect of bringing representation into legislation.

The view was expressed that a commission jointly funded by the Provincial and Federal Governments and with Indian representatives or individuals approved by the Indian Association to establish contact with other provinces and examine the effectiveness of these programs with a view to learning from them should be established.

Concern was expressed that Indians have not historically had any real control over the negotiation of capital and tuition agreements. Hence it was felt by those who made representations that clauses that may have enured to the benefit of Indians have either not been negotiated or have from time to time been dropped from such negotiations.

### LEGAL AND HISTORICAL BACKGROUND

#### The B.N.A. Act and Indian treaties

The B.N.A. Act gives jurisdiction to the Federal Government over Indians and Indian Bands. However, the legal effect of "Indians" as an exclusive head of federal legislative jurisdiction is obscured by the inclusion of "education" as a specific head of provincial authority. It is argued that it does not necessarily follow from the provisions of the B.N.A. Act that Federal Legislation authority alone creates rights in Indian peoples to a federally organized education scheme.<sup>1</sup>

Review of the literature and consultations in the course of this study lead to the conclusion that the Indians of Alberta lay great stress on the importance of the Treaties in determining their rights. In regard to education they emphasize:

The formal written Treaty Number Six provided:

"And further Her Majesty agrees to maintain schools for instruction in such reserves hereby made as to Her Government of the Dominion of Canada may seem advisable, whenever the Indians of the reserve shall desire it."

The formal written Treaty Number Seven Provided:

"Further, Her Majesty agrees to pay the salary of such teachers to instruct the children of said Indians as to Her Government of Canada may seem advisable when said Indians are settled on their reserves and shall desire teachers."

The formal written Treaty Number Eight provided:

"Further, Her Majesty agrees to pay the salaries of such teacher to instruct the children of said Indians as to Her Majesty's Government of Canada may seem advisable."

In his report on Treaty Six, Lieutenant Governor Morris wrote:

" I thought the desire of the Indians, to be instructed in farming and building, most reasonable, and I would therefore recommend that measures be adopted to provide such instruction for them..."

"The universal demand for teachers, and by some of the Indians for missionaries, is also encouraging."

The Report of the Commissioner for Treaty Eight laid great stress on education, particularly compared to the short one-sentence statement in the written treaty. The Commissioner wrote:

"They seemed desirous of securing educational advantages for their children, but stipulated that in the matter of schools there should be no interference with their religious beliefs..."

"As to education the Indians were assured that there was no need of any special stipulation, as it was the policy of the Government to provide in every part of the country, as far as circumstances would permit, for the education of Indian children, and that the law, which was as strong as a treaty, provided for non-interference with the religion of the Indians in schools maintained or assisted by the government."<sup>2</sup>

There is judicial authority for the proposition that in construing the terms of the treaties, the courts will give cognizance to the terms of negotiation.<sup>3</sup> It has been argued<sup>4</sup> that there is further authority for the proposition that Indian peoples have no lesser rights in education than do peoples of the general community, but additionally have special benefits with respect to the payment for education because of their unique contractual position with the Federal government arising out of the treaties.

The question arises as to whether the designation of Indians as being within the exclusive jurisdiction of the Federal Parliament ipso facto removes all provincial jurisdiction to legislate with respect to them.

Legal counsel for the A.S.T.A. argues (specifically in relation to Bill 214):

1. Validity of Provincial Legislation Dealing with Indians

It appears that the intended legislative provisions embodied in Bill 214 are ultra vires the Provincial authority to legislate as the legislation is, in respect of one of those subjects enumerated in Section 91.(24) of The British North America Act, 1867, over which the Federal Government has exclusive legislative authority, namely, "Indians and lands reserved for Indians". Other relevant legislative provisions which must be kept in mind in deciding the issue of whether or not the legislation proposed in Bill 214 is ultra vires Provincial legislative authority, are Section 93 of The British North America Act, 1867 and Section 88 of The Indian Act, Revised Statutes of Canada, 1970, ch I-6, which read as follows:

Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec;

(3)

Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Queen's Subjects in relation to Education;

(4)

In case of any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of their Section is not made, or in case of any Decision of the Governor General in Council on any Appeal under this provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is make by or under this Act.

As a result of these other legislative provisions referred to, to this point, it is obviously necessary that an inquiry be made as to whether or not the legislation proposed in Bill 214 can be said to be a Provincial law of general application and therefore, an enactment contemplated by Section 88 of The Indian Act as being applicable to Indians as well as other persons within the Provincial boundaries. In making such an inquiry, it is submitted that a convenient test to determine whether or not a Provincial enactment is a law of general application, may be found in the Judgment of Justice Dickson rendered in the case of Kruger and Manuel v. the Queen, (1977)4 W.W.R., 300 at p. 304, where the following appears:

"There are two indicia by which to discern whether or not a provincial enactment is a law of general application. It is necessary to look first to the territorial reach of the Act. If the Act does not extend uniformly throughout the territory, the inquiry is at an end and the question is answered in the negative. If the law does not extend uniformly throughout the jurisdiction, the intention and effects of the enactment need to be considered. The law must not be "in relation to" one class of citizens in object and purpose. But the fact that a law may have graver consequences to one person than to another does not on that account alone, make the law other than one of general application. There are few laws which have a uniform impact. The line is crossed however, when an enactment, though in relation to another matter, by its effect impairs the stature or capacity of a particular group. The analogy may be made to a law which in its effect paralyzes the stature and capacities of a federal company: see Great West Saddlery Co. v. The King (1921) 2 A.C. 91. Such an act is no "law of general application". See also Cunningham v. Tomey Homma (1903) A.C. 151."

It is submitted that if the foregoing test is applied to the proposed legislation in Bill 214, it fails to meet the test as it purports to deal with Indians qua Indians. Accordingly, on the basis of the foregoing, it would appear that the proposed legislation is ultra vires Provincial legislative authority (See Appendix I).

While the writer finds the above view highly persuasive the question remains as to its validity when one considers that education is a specific head of provincial legislative responsibility. One must ask whether the federal government in fact has the legislative jurisdiction to enact the educational provisions of the Indian Act. Thus, Foley argues that here the "peculiar historical relationship between Indians and the Queen must be examined".<sup>5</sup> It is submitted that the authority for the Federal government to be involved with Indian education stems, not only from its legislative authority under the B.N.A. Act for Indians qua Indians, but also from the Treaties. It is for this reason, inter alia, that Indians view with suspicion any attempt to transfer responsibility for Indian education to the provinces.

It is understandable that Indians should be thus concerned and this concern is the basis for much of the political maneuvering of recent weeks, and explains particularly representations now being made by Indians in England.

The status of treaties remains unresolved, and may be open to some interpretation. Thus, Daniels points out:

#### Treaty Rights and Education

In respect of the educational clauses, some riders were also included...promises...in treaties 3 and 5-11, were made conditional upon such provisions being "deemed advisable" by the Dominion Government.<sup>6</sup>

From the Indian point of view, however such conditional clauses are not in the spirit of the Treaties. At the signing of treaty number 7 for example, Indian negotiators

...asked for and received assurance that the government would be "willing to give means to instruct children as long as the sun shines and water runs, so that our children will grow up ever increasing in knowledge."<sup>7</sup>

It is thus argued that "the intent of the promises, rather than their exact wording, has to be considered if the original undertakings of the signatories of the treaties are to be fulfilled."<sup>8</sup>

Historical Involvement of Band Authority in Education

As early as the Indian Act of 1880, Chiefs, or Chiefs in Council had the power to make rules and regulations concerning, inter alia the religious denomination of the school teacher. This power was extended in 1884 to making rules regarding school attendance and in 1894 more powers to enforce attendance were provided.

In 1906 the Indian Act had a specific heading for "Schools" in which Band Councils retained their authority for framing rules and regulations, but standards for buildings, equipment, teaching and discipline could be made by the Governor in Council in the 1920 Act. A right to inspect schools was also granted to Indian Bands in that Act.

The 1951 Act and The Basis of Present  
Day Tuition Agreements

After exhaustive review by a Special Joint Committee of the Senate and House of Commons, the 1951 Act was promulgated and a number of major changes effecting Indian Education emerged.

- a) Provision for transfer by agreement of the administration of Indian Education to Provincial or Territorial Governments or school boards
- b) the abolition of the previous two-barreled system which had enabled both the Minister and Band Council to frame regulations relating to education.
- c) provision for Band Councils "in an advanced stage of development" to make money bylaws and appointments of officials.
- d) declaring Indians living off reserve not to be subject to the education provisions of the Act.

As a consequence of the 1951 Act acceptance of Indian students into provincial school systems rose dramatically from 1956-1970, but while this was welcomed by those favouring integration and assimilation, Indians in particular began to suspect that the federal government sought to renege on certain treaty rights. In 1969, the production of the Federal Government's White Paper, appeared to confirm this view.

The Federal Government White Paper 1969

This policy paper, tabled by the then Minister of Indian Affairs Jean Chretien contained six policy recommendations based on the philosophy "that if Indians were to achieve equality with other Canadians, the removal of any grounds for legal discrimination...would be essential".<sup>10</sup> Among other things, it was proposed that education was to be provided by the same government agencies which served all Canadians.

Provincial governments however, already had enabling legislation in place to provide for tuition agreements. In 1963 British Columbia entered into a general provincial agreement with the Federal government to provide these services."<sup>11</sup> In Manitoba, Boards of trustees were permitted to enter tuition agreements with a "Department or agency of the Government of Canada".

In 1965, Manitoba entered a province wide agreement with the federal government.

Since 1956, Alberta has had provision for agreement between Boards and the Federal government, and in Ontario the option has existed for Boards or the Minister of Education to exercise such agreements. Saskatchewan has had numerous local agreements in force since the mid 1950's, while New Brunswick since 1966 was enabled to enter a general agreement with the Government of Canada.

It can be seen that a number of Provincial Governments have legislation in place which provides for Tuition agreements and the provinces of British Columbia, Saskatchewan, Manitoba and New Brunswick have legislation which provides for equal or better than equal representation in School Boards.

It is not intended at this point to delve into any detailed account of legislation in other provinces, since time and resources make this impossible. However, Darryl Nicolas of the I.A.A. has been kind enough to provide a document (Attached as Appendix "A") which appears to be a reasonably comprehensive cross-Canada survey. This is attached for information, but I make no representations as to its reliability. Suffice it to say that it does appear that in some provinces, including Alberta, effective consultation and decision making procedures have often been locally developed even without specific legislation so aimed.

While Provinces have been willing to extend legislation providing for school board representation, the question remains, however, as to the advisability of assuming greater responsibility. In Senate hearings in 1970, Senator Carter said, "I would say there was a lack of any attempt on the part of the officials (of Department of Indian Affairs) to understand the cultures of the people with whom they were dealing".<sup>12</sup>

The Watson Report, 1971 advocated "no transfers of education programmes from the Federal level to Provincial systems take place without the express and clear approval of the majority of the parents in each community concerned".<sup>13</sup>

The Watson Report also recommended serious consultations be entered into with local, provincial and national Indian Associations to study the establishment of fully fledged School Boards on reserves.<sup>14</sup>

As reactions to the 1969 White Paper the papers Citizens Plus<sup>15</sup> and Indian Control Of Indian Education<sup>16</sup> represent the basic proposition for the controlling involvement of Indian people in the education of Indian children. As such they represented a strong reaction to the 1969 paper, and Jean Chretien appeared in 1973 to have reversed his position when he said "In consultation and cooperation with the Indian organizations, my Department will begin immediately to effect the educational changes for the Indian people that they have requested."<sup>17</sup>

One aspect of this policy was reflected in the statement:

I have already met with the Minister of Education of the provinces to discuss ways in which we can reinforce provincial programs for Indian students...This can only happen when the Indian people are involved in the schools and when they are adequately represented on school boards.<sup>18</sup>

#### The Contemporary Scene

From discussions with various Indian Representatives it is the understanding of this writer that Indian leaders do not believe that the Federal Government has rescinded its White Paper objectives of 1969. In documentation available at the Red Deer Chief's conference November 11, 1981 (Appendix C) it is said "Instead of shelving this policy, as the Prime Minister had promised, his administration has merely adopted a piecemeal and more gradual implementation policy."<sup>19</sup>

In addressing the question of aboriginal/treaty rights, the same document suggests:

"The problem of Indian dependency will be addressed jointly by means of a phased transfer to aboriginal people of political and economic power and authority in step with the development of their institutions."<sup>20</sup>

Whether or not the above perceptions are correct, the fact remains that the greater issues of treaty rights and the Constitution are an ongoing concern occupying a great deal of attention of Alberta Chiefs. In this context, it is not surprising that difficulties have been encountered in the conduct of this study.

Extensive reading around the subject of the relationship between Indians and the Federal Government, in combination with the meetings attended during the course of this study convince the writer that many of the fears of Indians are justified. There is no doubt, however, that generations of paternalism have produced a dependency relationship from which it is hard for the Indian people to extricate themselves.

At the same time, the writer has encountered among provincial school board officials a generally positive attitude towards rendering whatever assistance is possible in terms of Indian Education. It is most unfortunate, however, that school boards find themselves in the middle of a conflict, which is really none of thier making, but rather emerges from the paternalism and dependency relationship referred to above.

Current Federal Government/Indian discussions do hold the promise, notwithstanding Indian misgivings, that Indian Bands are moving with increasing confidence towards a greater degree of self determination. In this, as in any human enterprise, they are bound to make mistakes. Thus an additional factor which is bound to have an impact upon Band/School Board relationships is the type of Indian government which may possibly emerge from current discussions on the Draft Discussion Paper on revisions to the present Indian Act (Appendix D). It is submitted that, if Indians view Provincial initiatives as stemming from the Federal Government's perceived "Termination policy" such initiatives will continue to be treated by them with the utmost caution (see Appendix E Correspondence Re: Canadian Government Termination Policy). In such circumstances it is accordingly, difficult to establish whether any consensus among Indians is possible.

#### FEDERAL-PROVINCAL SCHOOL AGREEMENTS

Section 160 of the School Act R.S.A. 1970 c329 as amended provides:

A board with the prior approval of the Minister may

- (a) enter into an agreement with the Government of Alberta, the Government of Canada or the government of any other province, a municipality, another board or the operator of a private school for the provision of educational services,
- (b) enter into an agreement with the Government of Canada or any agency or person having responsibility for the education of Indian children to educate Indian children or the children of members of the Canadian Forces or of other persons employed by the Government of Canada in a school or schools of the district or division and receive consideration therfore,

- (b.1) enter into an agreement with a board of trustees or similar body in another province to provide or receive, as the case may be, educational, managerial, or any other service, matter or thing that relates to the operation of schools,
- (b.2) enter into an agreement with a corporation to provide educational services to handicapped pupils, where that corporation is not incorporated for the purpose of acquiring gain for its members,
- (c) enter into an agreement with one or more boards or a joint committee of the trustees of the boards whether pursuant to section 92, subsection (2) or not, to provide educational, managerial and any other service, matter or thing for pupils in one or more districts or divisions or any school therein, and
- (d) enter into an agreement with any person or organization to provide an early childhood services program to children resident in the district or division.

This complements the power of the Minister of Indian Affairs and Northern Development under section 114 of the Indian Act which provides:

114. (1) The Governor in council may authorize the Minister, in accordance with this Act, to enter into agreements on behalf of Her Majesty for the education in accordance with this Act of Indian children, with

- (a) the government of a province,
- (b) the Commissioner of the Northwest Territories,
- (c) the Commissioner of the Yukon Territories,
- (d) a public or separate school board, and
- (e) a religious or charitable organization.

(2) The Minister may, in accordance with this Act, establish, operate and maintain schools for Indian children.

Section 115 further provides:

115 The Minister may

(a) provide for and make regulations with respect to standards for buildings, equipment, teaching, education, inspection and discipline in connection with schools;

(b) provide for the transportation of children to and from school;

(c) enter into agreements with religious organizations for the support and maintenance of children who are being educated in schools operated by those organizations; and

(d) apply the whole or any part of moneys that would otherwise be payable to or on behalf of a child who is attending a residential school to the maintenance of that child at that school.

The writer was provided by the Department of Education with a copy of tuition agreement negotiated between the Federal Crown and Cardston School Division #2 in 1969 as representing a "typical" agreement. For purposes of this study it is assumed that its designation as a typical sample is correct, although it is recognized that other agreements are currently being renegotiated.

A number of clauses are cause for concern, as follows:

And whereas the Board has agreed to enroll Indian children in any school operated by the Cardston School Division #2 (hereinafter called the Division) and to provide such children with the same education and instruction as it provides to non-Indian children enrolled in any school in the Division.  
(my emphasis)

The Board shall:

3(b) accept Indian students for enrollment at the divisional Schools at the commencement of each school year on the same basis as Divisional students and provide to such children the same educational opportunities and instruction as it provides to non-Indian children attending Divisional schools.

5(c) where applicable provincial statutes, regulations and orders governing education in the province permit, the Board shall endeavour to arrange for representation of Indian residents on the Boards of School districts, the schools of which are attended by Indian students.

6(a) Nothing contained in this agreement shall confer upon the Minister any right of formal classroom inspection, supervision over the curriculum, the administration of teaching personnel, the methods or materials of instruction or management generally of the divisional schools; provided, however, the Minister or any person authorized by the Minister shall have the right to visit from time to time those Divisional schools attended by Indian students, provided such visit is made with the knowledge and agreement of the Board.

There is no express obligation for a school board to adhere to the provisions of the Indian Act, and it is submitted that the above provisions purport to make the School Act the applicable statute. The lack of Federal control under such agreements raises the question as to whether the Federal Crown can legitimately abrogate thus its responsibilities under The Indian Act (and, it might be argued, the Treaties). Are such agreements beyond the scope of the Indian Act and the empowering Governor in council orders? It is submitted that those provisions indicated above provide for the School Act of Alberta to be the governing statute for those Indian children educated pursuant to such agreements. It is further submitted that this is done without proper statutory authority and as an improper delegation of statutory authority. The writer relies upon Attorney General of Nova Scotia v Attorney General of Canada (1951) SCR 31, where the Supreme Court of Canada stated that legislative jurisdiction could not be delegated from Parliament to the province where the B.N.A. Act gave exclusive jurisdiction to Parliament. Therefore, on the basis that Indian education is under the exclusive authority of Parliament the application of Alberta's School Act to the education of Indian children under existing tuition agreements would appear to be done without constitutional validity. It is submitted further that any move to provide Indian representation on School Boards would be equally invalid, and on the same grounds. In addition if Indians were to be placed in the same position as other property owners with a school district it is arguable whether Indian Affairs payments of a grant in lieu of taxes should be sufficient to cause a statutory amendment whereby such Indian become electors(footnote 21). It is submitted that these conclusions render the questions other than those relating to tuition agreement negotiations academic.

Renegotiation of Tuition Agreements

It appears that, in a number of instances Bands, or other representatives of Indian communities, are taking some initiatives with regard to renegotiation of the tuition agreements, and it is possible that future agreements can more appropriately address the inter-delegation issue.

The Lesser Slave Lake Indian Regional Council have provided the writer with materials (appendix K) which indicated that they have developed a process which maximizes the involvement of the band membership in the creation and negotiation of new agreements.

Because of time constraints the writer did not obtain copies of agreements already negotiated in that area.

The renegotiation of the Cardston School Division #2 is currently at an impasse.

Discussions in the course of this study established that legal counsel for the Cardston Band saw direct Band involvement as problematic in that the Band cannot be a party to the agreement within the context of the two pertinent Acts. As well, the proposal that a Board member be appointed from the Blood Band was seen as being potentially illegal in terms of the School Elections Act, The Indian Act and the Municipal Government Act. It should be noted, however, that said counsel did not discuss directly the inter-delegation problem discussed above.

The writer has also reviewed draft proposals involving the Four Band Council of Hobbema and their negotiations. The proposal there is to delegate to the Four Band Council power to enter into agreements with local school boards, with the prior approval of the Federal Minister. One part of the draft proposal appears to delegate a power of inspection to the Council and in this appears not to abrogate the Minister's powers under the Indian Act as distinct from the manner in which this is done in older agreements referred to earlier.

The Four Band Council also seeks in its draft agreement with the Ponoka: RCSSD # 95 to have the right to make classroom inspection, supervise Indian curriculum content, and consult on the hiring of teaching personnel and manner of instruction, as well as such matters as appointment of representatives to attend Board meetings, staffing, expulsion and grievance procedures.

It is submitted that such provisions are more consistent with the Indian Act than the provisions with regard to representatives to attend Board meetings are not inconsistent with a contractual basis for the education of Indian children, and may well be a valid step in the direction of more appropriately providing for an accommodation between Federal and Provincial authorities which should be the most productive means of resolving the present difficulties.

### CONCLUSIONS

1. Legislation in relation to Indian education can only be invoked by that level of government which has responsibility for the education of Indians.
2. In the opinion of this writer, the Indian people are correct when they insist that their rights with respect to education are determined by reference to the British North America Act and the Treaties.
3. The writer concurs with Legal Counsel for the Alberta School Trustee's Association, that any proposed legislation by the province in respect to Indians qua Indians would be ultra vires the Provincial Government.
4. The paternalistic/dependency relationship between the Department of Indian and Northern Development and Indians remains a stumbling block to the meaningful involvement of Indian parents in the education of their children.
5. The status of Indian Governments as such remains an unresolved question. Under a draft discussion paper consultations are continuing between Indian representatives and the Federal government which may produce conditions whereby Indian Bands attain greater powers of self government.
6. Indian leaders may view provincial initiatives in relation to their people as stemming from a perceived Federal Government's "Termination policy". At the same time it is perceived that children educated in Provincially-run institutions appear to be receiving better education and facilities than those in Federally-run schools. The perceived poor quality of reserve schools is seen as a deliberate policy of the Federal Government to run down such services and hence force children into the provincially-run institutions. At the same time, some Indian leaders believe, the capital and tuition agreements with provincial school boards incur greater benefits to the school board and surrounding non-Indian communities than to the Indian communities.

7. Most current agreements between Federal Government agencies and school boards invoke no obligation on the parts of school boards to adhere to the provisions of the Indian Act, rather, the School Act of Alberta is the governing statute pursuant to such agreements. This writer concludes that such agreements as they exist constitute an improper delegation of Federal statutory authority to provincial institutions and the application of the Alberta School Act to the education of Indian children under existing tuition agreements is done without constitutional validity.

8. It follows from the aforesaid that any Indian representation on School Boards under the Alberta School Act would be invalid on similar grounds.

9. Neither is it likely to be proper for Indians to be brought into the general electorate for purposes of school board elections, since Indian Affairs payments in lieu of taxes would not be a proper basis to bring Indians under the auspices of provincial legislation.

10. Current renegotiations involving tuition agreements indicate a direction towards greater involvement by Indian Bands in such negotiations. Some of the proposals examined appear to be more consistent with the Federal Government maintaining its constitutional responsibilities for Indian education.

11. The writer concludes that it is only through the renegotiation of tuition and capital agreements bearing in mind the Federal responsibility for Indian Education, that the problem of effective Indian involvement in the education of their children be resolved. It is concluded that questions 2.1-2.5 and 2.7 are rendered academic by the conclusions aforesaid.

### RECOMMENDATIONS

The findings and conclusions of this study indicate that neither the election to nor appointment of Indian representatives to school boards is a viable consideration in view of the constitutional position of Indians, in terms of the problems associated with internal Band politics which are no concern of the provincial government, nor in terms of the relationship existing between the Federal Government and Indian Bands.

If any action is to be taken at all, then it is essential that the problems existing in the relationship between the Federal Government and the Indian Bands first be resolved.

Legislation should provide that Band Education Authorities, or, where appropriate, Regional Councils may negotiate terms for liaison with School Boards in a manner appropriate to local conditions.

Legislation should accommodate any transition from direct Federal government involvement in the negotiation of capital and tuition agreements to the involvement of Band Education Authorities, or, where appropriate, Regional Councils as parties to the agreements. This will require reciprocal arrangements on the part of the Federal Government.

Provision should be made empowering the school boards to meet the requirements of the Indian Act where it is necessary in terms of the tuition agreements. It is recommended that these agreements provide for the establishment of standing liaison committees between the main parties to the agreements (School Board/Band Council or Educational Authority). The terms of reference of such committees need not be mandatory, but rather, subject to whatever terms the parties to the agreement may be able to work out between them. It is suggested that such liaison committees would be an effective means at the local level of ensuring the cooperation of the parties in defining problems, enhancing communication and effectively resolving conflicts.

In view of the lack of background experience and involvement by both Bands and Boards in these agreements, it is recommended that a commission be established, jointly funded by the Provincial and Federal Governments and having two branches:

A )A CONSULTATIVE /ADVISORY BRANCH to render assistance to the parties in:

i) the negotiation process, the redrafting and revision of existing agreements,

ii) the interpretation of agreements,

iii) to assist, on request, in facilitating liaison between the parties,

iv) review tuition and capital agreements,

v) recommend the approval of these by the respective Ministers,

vi) advise School Boards and Bands of the validity and enforceability of the agreements,

vii) advise the respective Ministers on any legislative or regulatory changes which might be necessary in the system of tuition agreements,

viii) maintain a registry of capital and tuition agreements

ix) maintain such other records as are necessary

B )AN ARBITRATION BRANCH This branch should have a number of powers and should be a quasi-judicial body, but only to be used if all of the resource of the consultation process provided for in the other branch have been exhausted

- i) the arbitration branch should have power to call evidence under the Inquiries Act and,
- ii) hear appeals by either party on such matters as non-compliance with agreements and the proper interpretation and application of all clauses within the agreements,
- iii) hear appeals from any party affected by the final provisions of such agreements in matter resulting from:
  - A) the interpretation or application of the terms of the agreement by those responsible for administering the same,
  - B) the abridgement of individual rights by actions of the parties to an agreement.

The arbitration branch upon hearing such appeals may:

- i) issue directives for corrective action resulting from the appeal process,
- ii) advise the respective Minister of any situation that would indicate the need to investigate the financial operation of a local Band or School Board in relation to the handling of funds pursuant to a capital or tuition agreement,
- iii) advise the respective Minister of the need to remove or replace members of a Band Education Council or School Board member,
- iv) where breach of an agreement is proven, award damages in respect of such breach.

FOOTNOTES

- 1) Foley, Indian education in Saskatchewan: A Report of The Federation of Saskatchewan Indians, Vol. 1, 1973, Saskatoon.
- 2) Citizens plus, Indian Chiefs of Alberta, 1970.
- 3) R.V. Johnston (1966) 49C.R.203, 56W.W.R.565.
- 4) Foley op. cit., 3.
- 5) ibid, 4.
- 6) Daniels, E.R. The legal context of Indian Education in Canada PhD Thesis, 1973, Department of Educational Administration, University of Alberta.
- 7) Main, Through the MacKenzie Basin, cited in Price, The Spirit of the Alberta Indian Treaties Institute for Research on Public Policy, Richard Price (Editor) 1979, page 75, 76.
- 8) Daniels, page 5.
- 9) op. cit. 94-113.
- 10) Personn, D.L. Blue Quills; A Case Study of Indian Residential Schooling PhD thesis, 1980, University of Alberta in Anthropology and Education, page 225, Also discussed: Daniels op cit 197 et seq.

APPENDIX

A

A Survey of Indian Representation On Provincial and Territorial School Boards

B

Indian Education, Statement by the Honourable Jean Chretien, Minister of Indian Affairs and Northern Development, Ottawa, May 24, 1973.

C

Toward A Constitutional Accord, Paper available at Red Deer Conference, November, 1981.

D

Draft Discussion Paper On The Indian Act, Federal Cabinet, 1981.

E

"Canadian Government Termination Policy" Legal Opinion, Lawyers for Indian Association of Alberta, October 9, 1981.

F

"Cardston School Division #2 Tuition Agreement", Legal Opinion, Lawyers for Blood Band Administration, March 25, 1981.

G

Statement of Principles of Chiefs, Re: Representation.

H

Submission (written) of Ernest Hodgson Re: County Act and Indian Representation.

I

Indian Representation on School Boards, A.S.T.A. Legislation Council,  
September 18, 1981.

J

Correspondence with Indian Association of Alberta.

K

Slave Lake Regional Council Annual Report, 1978.

L

Indian Control of Indian Education , Task Force on Educational Needs  
of Native Peoples of Ontario.

M

Correspondence R. E. Pinney, to R. McNally, comments.

- 11) Proceedings of the Special Committee of the Senate on Poverty 1970, cited.
- 12) Ibid, 195.
- 13) Ibid, 195.
- 14) Ibid 196.
- 15) 1970, Indian Chiefs of Alberta, op cit.
- 16) 1972, National Indian Brotherhood. Indian Control of Indian Education.
- 17) Daniels, op cit. 203.
- 18) Indian Education Vol.111 #5 June 1973, page 9, (See Appendix B).
- 19) Towards A Constitutional Accord see appendix C
- 20) Ibid
- 21) See, for a more extensive discussion of this problem: Foley, in Indian Education in Saskatchewan ; A report of the Federation of Saskatchewan Indians v.1, 1973, Saskatoon.

GROUPS AND INDIVIDUALS CONTACTED

A. GOVERNMENT DEPARTMENTS AND AGENCIES

Department of Education Steering Committee

Federal Inter-Governmental Affairs

    Legal Counsel

Department of The Attorney General

    Legal Counsel

Department of Native Affairs

    Native Secretariat

Federal Department of Indian and Northern Affairs: Regional Superintendent  
of Non-Federal School Agreements

B. SCHOOL JURISDICTIONS

County of Parkland #31

County of Ponoka #3

County of St. Paul #19

Glen Avon PS School District #5

(Lakeland School District #5460)

(Pincher Creek RCSSD # 18)

(Valleyview RCSSD #84)

St. Paul Regional School District #1

Cardston School Division #2

Fort Vermilion School Division #52

High Prairie School Division #48

Willow Creek School Division #28

(Northland School Division #61)

Initial telephone contacts were made with those jurisdictions in parentheses,  
but no subsequent discussions occurred because of time constraints. My apologies.

C. INDIAN GROUPS

Indian Association of Alberta

    Education Secretariat

Four Band Council, Hobbema  
Lesser Slave Lake Regional Council of Chiefs  
Saddle Lake Band  
Goodfish Lake Band

D. INDIVIDUALS

Darryl Nicolas-Indian Association of Alberta: Education Secretariat  
Richard McNalley-Legal Counsel Alberta School Trustees Association  
Paul Schmidt Director: Education and Social Services, Goodfish Lake  
Eugene Houle Saddle Lake School Board  
Allan Willier: Band Organizer-Little Red River Band  
Mike Steinhauer- Blue Quills School  
Donna Hawley- Legal Counsel: Hobbema reserve  
Chief Sam Bull- Goodfish Band  
Dr. E. Hodgson: Trustee, Edmonton Public School Board  
Mel Buffalo, Four Band Council  
Marilyn McDonald Buffalo- Fort McMurray  
Mary Cardinal- Edmonton, teacher

GROUPS AND INDIVIDUALS CONTACTED

TABLE OF CASES

1. Attorney General of Nova Scotia v Attorney General of Canada (1951) SCR 31
2. Brown v R. (1980) 3 WWR 360
3. Cardinal v A G Alta (1974) SCR 695  
(1973) 6 WWR 205
4. Cunningham v Tomey Homma (1903) AC 151
5. Great West Saddlery v The King (1921) 2 AC 91
6. Kruger v Mannel (1977) 4 WWR 300
7. Mintuck v Valley River Band #63 A et al.  
((1976) 4 WWR 543)
8. Mintuck v Valley River Band #63 A (No. 2) (1978) 2 WWR 159
9. Moses v R (1979) 12 BCLR 308
10. Myran v R (1976) 2 SCR 137  
(1976) 1 WWR 196
11. Re Baptiste (1979) 6 WWR 560
12. R v Fiddler (1980) 6 WWR 5
13. R v National Indian Brotherhood (1979) 5 WWR 712
14. R v Simon (1977) 34 NSR 416
15. R v Tobacco (1980) 4 Sask. R 830
16. R v Two-youngmen (1979) 5 WWR 712
17. Town of Hay River v R (1979) 10 DLR (3rd) 184

Cardinal - (1973) 6 WWR 205

Pine River First Nation #37

High Prairie School Division #38

Willow Creek School Division #28

Northland School Division #51

C. INDIAN GROUPS

Indian Association of Alberta  
Education Secretariat

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